UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2012 MSPB 95

Docket No. CH-0752-09-0404-I-1

John Doe,

Appellant,

v.

Department of Justice,

Agency.

August 9, 2012

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

OPINION AND ORDER

¶1 The appellant has filed a petition for review of the initial decision that sustained his removal. For the reasons discussed below, we VACATE the initial decision and REMAND this appeal to the agency to apply its internal procedures for reviewing a decision to withdraw an employee's eligibility for access to classified information.

BACKGROUND

¶2 The appellant was an Assistant United States Attorney (AUSA) in a United States Attorney's Office (USAO) until his January 16, 2009 removal. Initial Appeal File (IAF), Tab 14, Subtab 4C. The events leading up to his removal began in August 2008. On August 4, 2008, Supervisor 3 (the United States

Attorney) told the appellant that he was being reassigned from the Economic Crimes Unit to the Community Crimes Unit, i.e., the "Gun Unit." *Id.*, Tab 76, Ex. 10. On August 11, 2008, the appellant submitted a reasonable accommodation request asking not to be reassigned, asserting that it would exacerbate his anxiety disorder. *Id.*, Ex. 50. In response to the agency's request for medical documentation to support the request, the appellant submitted Doctor 1's (his psychologist's) August 29, 2008 letter. The last sentence of the letter stated:

> He [the appellant] is currently having obsessive thoughts that he will have suicidal or homicidal ideation if he is moved to the "guns unit." I view this as evidence of his potential to decompensate into a depression with paranoid features.

Id., Ex. 15 at 5. Based on the letter, Employee 1 (the Executive Office for U.S. Attorneys' (EOUSA's) Chief of Personnel Security Section) determined on September 9, 2008, that the appellant was no longer eligible to hold a Special-Sensitive Level 4 position and that his assignment as an AUSA posed an unnecessary and unacceptable operational security risk. IAF, Tab 14, Subtab 4G at 38. On September 11, 2008, the agency placed the appellant on administrative leave. Hearing Transcript (HT) at 283, 615. On September 18, 2008, the appellant filed a complaint with the Office of Special Counsel (OSC) concerning his reassignment and office move. IAF, Tab 76, Ex. 21 at 5, 12; HT at 647. He subsequently responded to OSC's request for information, apparently identifying his public placement on administrative leave as another personnel action. *Id.*, Ex. 22; HT at 648.

¶3 On October 10, 2008, Supervisor 3 proposed to remove the appellant based on charges of (1) "failure to maintain a qualification for your position," and (2) "posing an operational security risk to the office." IAF, Tab 14, Subtab 4G at 4. Under Charge 1, Supervisor 3 stated as follows:

> In order to be qualified for an AUSA position, you must maintain eligibility to hold a Special-Sensitive, Level 4 position. On September 9, 2008, [Employee 1], Chief of the Personnel Security Section, EOUSA, determined that you were no longer eligible to hold a Special-Sensitive, Level 4 position. Therefore, you are no longer qualified for an AUSA position.

Id. Under Charge 2, Supervisor 3 stated as follows:

> On September 9, 2008, [Employee 1], Chief of the Personnel Security Section, EOUSA, determined that your "continued assignment as an AUSA in the USAO poses an unnecessary and unacceptable operational security risk to the Department."

Id. Supervisor 3 also explained, inter alia, that the appellant's AUSA position was designated as a Special-Sensitive, Level 4 position, which "involves the highest degree of trust; requires access, or affords ready opportunity to gain access, to Top Secret National Security Information (NSI) and material described in Executive Order 12356; and requires access to grand jury information." IAF, Tab 14, Subtab 4G at 1. The appellant submitted a supplemental response to OSC, apparently identifying his proposed removal as another personnel action. *Id.*, Tab 76, Ex. 23; HT at 648. OSC subsequently informed the appellant that it had closed its file and that he had the right to seek corrective action from the Board. *Id.*, Tab 1.

¶4 Supervisor 4 (EOUSA Chief of Staff and Deputy Director) upheld the proposed removal based on the two charges identified in the proposal notice. IAF, Tab 14, Subtab 4D. He explained as follows: Based on Doctor 1's note, USAO management spoke with the EOUSA security programs staff, including Employee 1. During the conversation, USAO management detailed the appellant's history of aberrant behavior in the office. *Id.* at 1-2. Based on Doctor 1's note and the conversation detailed in the notice of proposed removal, Employee 1 "determined that you were no longer eligible to hold a Special-Sensitive Level 4 position, which is a requirement to be an AUSA. In addition, [Employee 1] determined that you posed a security risk to the office. Based on [Employee 1's] determinations [Supervisor 3] proposed your removal." *Id.* at 2.

As previously noted, the agency removed the appellant effective January 16, 2009. IAF, Tab 14, Subtab 4C.

¶5 The appellant filed an appeal with the Board. IAF, Tab 1. The parties engaged in extensive prehearing activities, the appellant submitted voluminous records, and the administrative judge issued multiple orders. The administrative judge held a bifurcated hearing on August 25-27 and October 14, 2009. Initial Decision (ID) at 1.

¶6 The administrative judge found that the two charges brought against the appellant merged into one charge because they were both based on Employee 1's September 9, 2008 determination and involved the same conduct. ID at 2. Based on regulations, delegations, and practice, he found that the agency officials who decided the appellant's case properly exercised responsibilities within their authority. In that regard, he found that the Attorney General (AG) was not required to personally decide whether the appellant should be removed. He noted that the agency did not take the action under 5 U.S.C. § 7532 and the applicable agency regulation, which would require the AG to make the decision; rather, it took the action under 5 U.S.C. §§ 7511-13. He found that the appellant's interpretation of 28 C.F.R. § 0.138(a) as requiring the AG to personally decide all personnel actions involving agency attorneys was unreasonable on its face. ID at 4-6.

¶7 The administrative judge found that the requirement that the appellant maintain eligibility to hold a Special-Sensitive, Level 4 position, was functionally equivalent to a security clearance determination because employees in those positions have ready access to obtaining security clearances on short notice. He found that all AUSAs occupy Special-Sensitive, Level 4 positions; that under 28 C.F.R. § 17.12(d), the EOUSA's Security Programs Manager was authorized to withdraw access to classified information; and that Employee 1 had been delegated this authority in her position as Security Officer. ID at 6-7. He found that the appellant was not entitled to the procedures set forth at 28 C.F.R.

§ 17.47, which provide for Access Review Committee (ARC) review of any decision denying access to classified information, because he did not have actual access to classified information due to his lack of a security clearance. He acknowledged the appellant's argument that the agency's failure to grant him ARC review denied him due process rights to an "internal appeal procedure" to which he could object to an adverse decision on "security clearance issues." He found, though, that the appellant was afforded access to an "internal appeal procedure" that satisfied all due process requirements because the notice of proposed removal provided him with specific notice of the reasons for the proposed disciplinary action, allowing him to make an informed reply; Supervisor 4 considered his response before deciding to remove him; and Supervisor 4 specifically testified that he had authority to overturn Employee 1's security determination. *Id.* at 7-8.

¶8 Because the administrative judge found that the requirement to maintain eligibility to hold a Special-Sensitive, Level 4 position was functionally equivalent to a security clearance determination, he applied the limited scope of Board review set forth in *Department of the Navy v. Egan*, 484 U.S. 518 (1988), in reviewing the appeal. ID at 8. Concerning the four factors set forth in *Egan*, he found as follows: (1) the appellant was required to maintain eligibility to occupy a Special-Sensitive, Level 4 position; (2) the appellant's eligibility to occupy his position was withdrawn; (3) it was not feasible to transfer the appellant to a non-sensitive position; and (4) the agency followed the procedural requirements specified at 5 U.S.C. § 7513 in processing the removal action. *Id.* at 8-10.

¶9 The administrative judge addressed the appellant's affirmative defense of whistleblowing, although noting that the agency strenuously argued that the defense cannot be heard under *Egan*. Citing *Fellhoelter v. Department of Agriculture*, 568 F.3d 965 (Fed. Cir. 2009), he found that, if the agency were able to establish by clear and convincing evidence that it would have removed the

appellant in any event, he was not required to examine the particulars of the whistleblowing defense. ID at 10. He rejected as unproven the appellant's affirmative defense after finding as follows: (1) the strength of the agency's evidence supporting its decision was strong, if not irrefutable because the agency's determination was functionally equivalent to a security clearance determination and the appellant could not challenge the agency's designation of his position as Special-Sensitive, Level 4 or the merits of its decision to revoke his eligibility to hold his position as part of a whistleblowing claim; (2) there was little evidence supporting the appellant's supposition that the agency officials who took this action had a motive to remove him; and (3) there was no evidence that the agency engaged in disparate treatment of whistleblowers in comparison to non-whistleblowers. *Id.* at 10-12.

¶10 The administrative judge rejected as unproven the appellant's affirmative defense of disability discrimination as follows: The Americans with Disabilities Act Amendments Act (ADAAA) of 2008 did not expressly change the meaning of reasonable accommodation. The appellant must articulate a reasonable accommodation under which he believes he could perform the essential duties of his position or of a vacant funded position to which he could be reassigned. The agency proved that the appellant was ineligible to hold his position, and the appellant did not show that there is any vacant funded position to which he could be reassigned. ID at 13.

¶11 The administrative judge also rejected as unproven the appellant's affirmative defense of retaliation for filing equal employment opportunity (EEO) complaints. The administrative judge acknowledged that the appellant established that he engaged in a protected activity and that officials taking the action knew of the activity. He found, though, that the appellant had not shown that the intensity of the agency's motive to retaliate overcame the reasonableness of the agency's action because his failure to meet an essential eligibility requirement for his position was a compelling, if not irrefutable basis for the

agency's disciplinary action; he had not proven the existence of a similarly-situated employee comparator; there was no evidence from which an inference of retaliatory intent might be drawn; and the evidence did not show that the agency's action was pretextual in nature. ID at 13-15.

¶12 Concerning the appellant's other defenses, the administrative judge rejected as unproven his argument that the agency did not give him the information on which it relied in proposing his removal. ID at 15. He found that the appellant failed to show harmful procedural error warranting reversal in the agency's reliance on disciplinary actions that allegedly should have been removed from the record. In that regard, the administrative judge found that the appellant cannot challenge the merits of the agency's action finding him ineligible to hold a Special-Sensitive, Level 4 position, and that, because consideration of the appellant's past disciplinary record and the underlying reasons for that record goes to the merits of the agency's decision, he could not show harmful error warranting reversal of the agency's action. *Id.* at 15-16. The administrative judge acknowledged the appellant's contention that the agency was obligated by regulation to obtain independent medical verification of his condition and that it distorted the medical evidence relied on in its action, but similarly found that the appellant's argument addressed the merits of the agency's security determination, a matter beyond the Board's scope of review. He further acknowledged the appellant's allegation that, in failing to secure independent medical verification of his condition, the agency violated adjudicative guidelines under Exec. Order No. 12,968. He found, though, that Exec. Order No. 12,968 does not create any right to administrative or judicial review or any other right or benefit, citing *Romero v. Department of the Defense*, 527 F.3d 1324, 1330 n.1 (Fed. Cir. 2008). ID at 16.

¶13 The administrative judge concluded that the Board must uphold the appellant's removal. He found that the agency had supported its charges by the

requisite burden of proof and that the appellant had not established any affirmative defense warranting reversal of the agency's action. ID at 16.

¶14 The appellant filed a petition for review. Petition for Review (PFR) File, Tab 4. The agency filed a response opposing the petition for review.[1] *Id.*, Tab 5.

ANALYSIS

Merger of Charges

¶15 The appellant asserts that the administrative judge erred in merging the two charges, contending that one need not have security clearance eligibility to pose an operational security risk, that one does not have to be an operational security risk to have a clearance eligibility revoked, and that Charge 2 was not a national security determination precluded from examination under *Egan*. He further asserts that the agency did not prove Charge 2. PFR at 7, 18 n.44, 23 n.57, 31-33.

¶16 We need not determine whether the administrative judge correctly merged the charges because, as discussed below, the limited scope of Board review set forth in *Egan* applies at least to Charge 1. As also discussed below, proof of that charge is sufficient to warrant removal even absent consideration of the second charge. *See, e.g., Luciano v. Department of the Treasury*, 88 M.S.P.R. 335, ¶ 10 (2001), *aff'd*, 30 F. App'x 973 (Fed. Cir. 2002). Thus, whether the administrative judge erred in merging the charges does not affect the analysis or outcome of this appeal.

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[1] The Board denied the appellant's motion for leave to file a reply brief and request for oral argument. PFR File, Tabs 6-9. We have considered the appellant's January 19, 2011 supplemental filing to the extent that it discusses the effect of the subsequently-issued *Conyers v. Department of Defense*, 115 M.S.P.R. 572 (2010) and *Northover v. Department of Defense*, 115 M.S.P.R. 451 (2010), on his appeal. PFR File, Tab 11. We thus DENY in PART the agency's motion to strike that supplemental filing. *Id.*, Tab 12.

Designation of Position/Scope of Board Review

¶17 We agree with the administrative judge that the appellant's position was designated Special-Sensitive, Level 4. Although the appellant protests that he did not learn that he was required to maintain "a Level 4 clearance eligibility" until after his eligibility was revoked and he learned that he was to be terminated, PFR at 16, he has not contested the administrative judge's finding. In that regard, the administrative judge cited agency documentation providing that all AUSA positions "are designated Level 4." ID at 8; IAF, Tab 58 at 34. He also cited testimony from Employee 3 (EOUSA Acting Chief Operating Officer and Acting Administrative Officer) that all AUSAs occupy Special-Sensitive, Level 4 positions. ID at 6; HT at 20. Further, he stated that, as he previously advised the parties, "the appellant cannot challenge the decision of the agency to classify his position as Special-Sensitive, Level 4." ID at 11. As the administrative judge found, the Board lacks authority to determine whether the agency properly designated the position. *Skees v. Department of the Navy*, 864 F.2d 1576, 1578 (Fed. Cir. 1989); *Brady v. Department of the Navy*, 50 M.S.P.R. 133, 138 (1991).

¶18 In his supplemental filing, the appellant asserts that, regardless of his position's designation, the limited scope of review set forth in *Egan* does not apply in his case, citing *Conyers v. Department of Defense*, 115 M.S.P.R. 572 (2010), and *Northover v. Department of Defense*, 115 M.S.P.R. 451 (2010). He contends that the Board held in those decisions that *Egan*'s limited scope of review does not apply to adverse actions taken against federal employees "who do not actually have a security clearance," PFR File, Tab 11 at 4, and states that the agency conceded that he did not have a security clearance, *id.* at 6.

¶19 The appellant's supplemental filing misinterprets *Conyers* and *Northover*. In those cases, the agencies stipulated that the appellants' positions did not require them to have security clearances or access to classified information. *E.g.*, *Conyers*, 115 M.S.P.R. 572, ¶ 13. Under those circumstances, the Board concluded that *Egan* did not limit its statutory review authority. *Id.* The Board

further concluded, however, that *Egan* limits the Board's review of an otherwise appealable adverse action "if that action is based upon a denial, revocation or suspension of a 'security clearance,' i.e., involves a denial of access to classified information or eligibility for such access." *Id.* (emphasis added). Thus, the Board defined "security clearance" to mean "eligibility for access to, or access to, classified information." *Conyers*, 115 M.S.P.R. 572, ¶ 17.

¶20 We find that the limited scope of review set forth in *Egan* applies in adjudicating the charge. The administrative judge correctly found that Employee 3 explained that the agency limits the number of actual security clearances it issues but that employees occupying Special-Sensitive, Level 4 positions "have ready access to security clearances should the need to secure one on short notice become necessary." ID at 4 n.1; HT at 26-27. The administrative judge also correctly found that Employee 3 further stated that "only employees who actually hold a security clearance have authority to review classified material." ID at 4 n.1; HT at 27. In its response, citing Exec. Order No. 12,968, the agency noted that AUSAs do not ordinarily maintain active security clearances because of government policy requiring that such clearances be limited, but explained that all AUSAs are subjected to the same background check as individuals with security clearances and must be able to be quickly authorized to handle classified information, thus making activation of security clearances "simply an administrative matter." PFR File, Tab 5, Agency Resp. at 5 n.5; *see also* HT at 25-27. The appellant has cited nothing to contest this representation. Thus, we find that the appellant's position required eligibility for access to classified information, and the limited scope of review set forth in *Egan* applies.

¶21 The appellant appears to be arguing that the agency was required to remove him under 5 U.S.C. § 7532 because it based his removal on a national security determination, and, thus, that the AG was required to decide his appeal and he was entitled to the procedures set forth in that statutory provision. In that regard, he apparently believes that 5 U.S.C. § 7511-13 governs only "suitability"

proceedings. He contends that the agency similarly erred in not designating the officials involved in his removal proceedings consistent with that provision and its applicable regulations and in citing superseded regulations, and that the AG was required to decide his appeal, in any event. PFR at 10-11. As the administrative judge found, the agency proceeded under 5 U.S.C. § 7511-13, not 5 U.S.C. § 7532. ID at 4 n.2; IAF, Tab 14, Subtab 4G. Further, it was not required to act under 5 U.S.C. § 7532, and if it had chosen to act under that authority, his removal would still not be subject to Board review. *Egan*, 484 U.S. at 522 n.4. Moreover, to the extent that the appellant argues that Exec. Order No. 12,968 provides him with some appeal rights, it does not, at least not outside of the Department of Justice. *Romero*, 527 F.3d at 1330. The appellant's assertion that the administrative judge's finding in that regard did not absolve the agency, because the agency was required to adhere to its own separate regulations in processing his removal, PFR at 14, is addressed below.

Application of *Egan* Scope of Review

¶22 Under *Egan*, the agency must prove only that the appellant was required to maintain eligibility to occupy a Special-Sensitive, Level 4 position; his eligibility was withdrawn; transfer to a position that did not require this eligibility was not feasible; and he was provided with the procedural requirements of 5 U.S.C. § 7513. ID at 8; *Egan*, 484 U.S. at 530-31; *see also Hesse v. Department of State*, 217 F.3d 1372, 1376 (Fed. Cir. 2000). The record shows that the agency met this burden of proof.

¶23 Specifically, the unrebutted documentary evidence as well as testimony from at least four knowledgeable employees showed that the appellant's position required eligibility for Special-Sensitive, Level 4 status. ID at 8-9; *see also* IAF, Tab 58 at 34. Moreover, it is undisputed that the agency revoked the appellant's eligibility for Special-Sensitive, Level 4 status. Further, Employee 3 provided unrebutted testimony that the agency did not have a regulation that gave the appellant the right to be considered for vacant, non-sensitive positions. The

Board does not have authority to review the feasibility of reassigning the appellant to a vacant non-sensitive position, absent an enforceable right to such consideration. *Griffin v. Defense Mapping Agency*, 864 F.2d 1579, 1580 (Fed. Cir. 1989). In any event, the record reflects that all AUSA positions require Special-Sensitive, Level 4 eligibility, and therefore, that it was not feasible to assign the appellant to another AUSA position. ID at 9; *see also* HT at 90. The administrative judge found it undisputed that the agency followed the procedural requirements of 5 U.S.C. § 7513 by providing the appellant with advance written notice of the charges and a reasonable amount of time to make an informed reply, by considering the appellant's response before issuing its decision, and by providing the reasons for that decision. ID at 10; *see also* IAF, Tab 14, Subtabs 4D-4G. Therefore, we find that, contrary to the appellant's assertion, PFR at 4, the agency complied with the minimum due process requirements set forth in *Egan* in removing him.

Violation of Agency Regulations/Harmful Error

¶24 The appellant also argues in this appeal that the administrative judge erred, under *Romero*, 527 F.3d at 1329, in finding that the agency's action was analogous to a security clearance revocation, while concomitantly declining to enforce agency compliance with its own regulatory procedures for such revocations. In connection with this, he asserts that the agency erred in relying on Department of Justice Order 2610.2A, which gave authority to the EOUSA's "self-professed security expert" (Employee 1) to revoke his eligibility, and on Exec. Order No. 12,356. He contends that an agency Inspector General report recommended revising the order, that the order and Exec. Order No. 12,356 were superseded by Exec. Order No. 12,968, and that the order did not survive the promulgation of 28 C.F.R. part 17. He asserts that under 28 C.F.R. § 17.15(a), he was entitled to the ARC review procedures afforded employees whose security clearances were revoked. He contends that the administrative judge impermissibly equated the deciding official on his removal with ARC review of

an internal appeal in finding that he received the required procedures. He further contends that the errors were harmful because they caused the agency to reach a conclusion different than it would have reached absent the errors. PFR at 5-18.

¶25 In *Romero*, 527 F.3d at 1329, the court acknowledged that the Board may not review the substance of a security clearance revocation decision and found that the Board did not err in finding that the agency had complied with 5 U.S.C. § 7513 in removing Romero after it revoked his security clearance. The court vacated the Board's decision and remanded the matter, however, because the Board did not address whether Romero had shown that the agency committed harmful error in failing to follow its own procedures when revoking his Secret security clearance. *Id.* at 1325-26, 1329-30. The court found that *Egan* and other decisions did not preclude the Board from reviewing whether the agency complied with its own regulations and procedures in revoking Romero's security clearance. *Id.* at 1329. The statutory basis for such review is 5 U.S.C. § 7701(c)(2)(A), which provides that the Board may not sustain an action on appeal if the appellant "shows harmful error in the application of the agency's procedures in arriving at [its] decision." *Id.* at 1328.[2]

¶26 We agree with the appellant that he had the right to ARC review of EOUSA's decision to withdraw his eligibility for access to classified information. Our analysis begins with a statute enacted in 1994, which charged the President with establishing standards for access to classified information that would bind all executive branch agencies, and also with establishing --

> uniform minimum standards to ensure that employees in the executive branch of Government whose access to classified information is being denied or terminated under this subchapter are appropriately advised of the reasons for such denial or termination

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[2] In its subsequent decision, the court found that Romero failed to establish that the agency erred. Therefore, the court did not reach the issue of whether Romero established that any error was harmful. *See Romero v. Department of Defense*, 658 F.3d 1372, 1373, 1380 (Fed. Cir. 2011).

> and are provided an adequate opportunity to respond to all adverse information which forms the basis for such denial or termination before final action by the department or agency concerned.

50 U.S.C. § 435(a)(5). Pursuant to this statute, on August 2, 1995, President Clinton issued Exec. Order No. 12,968, which provides in relevant part as follows:

> **§ 1.2.** *Access to Classified Information.* (a) No employee shall be granted access to classified information unless that employee has been determined to be eligible in accordance with this order and to possess a need-to-know.
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> **§ 2.1.** *Eligibility Determinations.* (a) Determinations of eligibility for access to classified information shall be based on criteria established under this order.
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> **§ 3.1.** *Standards.* (a) No employee shall be deemed to be eligible for access to classified information merely by reason of Federal service or contracting, licensee, certificate holder, or grantee status, or as a matter of right or privilege, or as a result of any particular title, rank, position, or affiliation.
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> (b) Except as provided in sections 2.6 and 3.3 of this order, eligibility for access to classified information shall be granted only to employees who are United States citizens for whom an appropriate investigation has been completed and whose personal and professional history affirmatively indicates loyalty to the United States, strength of character, trustworthiness, honesty, reliability, discretion, and sound judgment, as well as freedom from conflicting allegiances and potential for coercion, and willingness and ability to abide by regulations governing the use, handling, and protection of classified information. A determination of eligibility for access to such information is a discretionary security decision based on judgments by appropriately trained adjudicative personnel. Eligibility shall be granted only where facts and circumstances indicate access to classified information is clearly consistent with the national security interests of the United States, and any doubt shall be resolved in favor of the national security.
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> * * *

§ 5.2. *Review Proceedings for Denials or Revocations of Eligibility for Access.* (a) Applicants and employees who are determined to not meet the standards for access to classified information established in section 3.1 of this order shall be:

(1) provided as comprehensive and detailed a written explanation of the basis for that conclusion as the national security interests of the United States and other applicable law permit;

(2) provided within 30 days, upon request and to the extent the documents would be provided if requested under the Freedom of Information Act (5 U.S.C. 552) or the Privacy Act (3 U.S.C. 552a), as applicable, any documents, records, and reports upon which a denial or revocation is based;

(3) informed of their right to be represented by counsel or other representative at their own expense; to request any documents, records, and reports as described in section 5.2(a)(2) upon which a denial or revocation is based; and to request the entire investigative file, as permitted by the national security and other applicable law, which, if requested, shall be promptly provided prior to the time set for a written reply;

(4) provided a reasonable opportunity to reply in writing to, and to request a review of, the determination;

(5) provided written notice of and reasons for the results of the review, the identity of the deciding authority, and written notice of the right to appeal;

(6) provided an opportunity to appeal in writing to a high level panel, appointed by the agency head, which shall be comprised of at least three members, two of whom shall be selected from outside the security field. Decisions of the panel shall be in writing, and final except as provided in subsection (b) of this section; and

(7) provided an opportunity to appear personally and to present relevant documents, materials, and information at some point in the process before an adjudicative or other authority, other than the investigating entity, as determined by the agency head. A written summary or recording of such appearance shall be made part of the applicant's or employee's security record, unless such appearance occurs in the presence of the appeals panel described in subsection (a)(6) of this section.

* * *

> (f)(2) Nothing in this section shall require that an agency provide the procedures prescribed in subsection (a) of this section to an applicant where a conditional offer of employment is withdrawn for reasons of suitability or any other reason other than denial of eligibility for access to classified information.
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> (3) A suitability determination shall not be used for the purpose of denying an applicant or employee the review proceedings of this section where there has been a denial or revocation of eligibility for access to classified information.

Finally, section 5.2(c) of the executive order provides that agency heads "shall promulgate regulations to implement this section."

¶27 In 1997, the Attorney General issued implementing regulations at 28 C.F.R. part 17, which provide in relevant part as follows:

> **§ 17.2.** Scope. (a) All employees, contractors, grantees, and others granted access to classified information by the Department are governed by this part, and by the standards in Executive Order 12958, Executive Order 12968, and directives promulgated under those Executive Orders. If any portion of this part conflicts with any portion of Executive Order 12958, Executive Order 12968, or any successor Executive Order, the Executive Order shall apply. This part supersedes the former rule and any Department internal operating policy or directive that conflicts with any portion of this part.
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> **§ 17.15.** Access Review Committee. (a) The Access Review Committee (ARC) is hereby established to review all appeals from denials or revocations of eligibility for access to classified information under Executive Order 12968. Unless the Attorney General requests recommendations from the ARC and personally exercises appeal authority, the ARC's decisions shall be final.
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> (b) The ARC shall consist of the Deputy Attorney General or a designee, the Assistant Attorney General for National Security or a designee, and the Assistant Attorney General for Administration or a designee. Designations must be approved by the Attorney General.
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> * * *
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> **§ 17.47.** Denial or revocation of eligibility for access to classified information. (a) Applicants and employees who are determined to

not meet the standards for access to classified information established in section 3.1 of Executive order 12968 shall be:

(1) Provided with a comprehensive and detailed written explanation of the basis for that decision as the national security interests of the United States and other applicable law permit and informed of their right to be represented by counsel or other representative at their own expense;

(2) Permitted 30 days from the date of the written explanation to request any documents, records, or reports including the entire investigative file upon which a denial or revocation is based; and

(3) Provided copies of documents requested pursuant to this paragraph (a) within 30 days of the request to the extent such documents would be provided if requested under the Freedom of Information Act (5 U.S.C. 552) or the Privacy Act of 1974 (5 U.S.C. 552a), and as the national security interests and other applicable law permit.

(b) An applicant or employee may file a written reply and request for review of the determination within 30 days after written notification of the determination or receipt of the copies of the documents requested pursuant to this subpart, whichever is later.

(c) An applicant or employee shall be provided with a written notice of and reasons for the results of the review, the identity of the deciding authority, and written notice of the right to appeal.

(d) Within 30 days of receipt of a determination under paragraph (c) of this section, the applicant or employee may appeal that determination in writing to the ARC, established under §17.15. The applicant or employee may request an opportunity to appear personally before the ARC and to present relevant documents, materials, and information.

(e) An applicant or employee may be represented in any such appeal by an attorney or other representative of his or her choice, at his or her expense. Nothing in this section shall be construed as requiring the Department to grant such attorney or other representative eligibility for access to classified information, or to disclose to such attorney or representative, or permit the applicant or employee to disclose to such attorney or representative, classified information.

(f) A determination of eligibility for access to classified information by the ARC is a discretionary security decision. Decisions of the ARC shall be in writing and shall be made as expeditiously as possible. Access shall be granted only where facts and circumstances

> indicate that access to classified information is clearly consistent with the national security interest of the United States, and any doubt shall be resolved in favor of the national security.
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> * * *
>
> (i) . . . Suitability determinations shall not be used for the purpose of denying an applicant or employee the review proceedings of this section where there has been a denial or revocation of eligibility for access to classified information.

¶28 From the foregoing, it is clear that departmental-level ARC review procedures mandated by Exec. Order No. 12,968 were intended to apply to termination of eligibility for access to classified information. The agency's argument that ARC review is available only for employees who have actually been granted access to classified information is based on 28 C.F.R. § 17.2(a), which describes the coverage of part 17 as "[a]ll employees, contractors, grantees, and others granted access to classified information." However, the regulations at part 17 must be read as a whole, not selectively. *Lezama-Garcia v. Holder*, 666 F.3d 518, 532 (9th Cir. 2011); *Benitez-Pons v. Comm. of Puerto Rico*, 136 F.3d 54, 63 (1st Cir. 1998). Section 17.15(a) states that the ARC "is hereby established to review all appeals from denials or revocations of *eligibility for access* to classified information under Executive Order 12968" (emphasis supplied). Likewise, section 17.47 indicates that ARC review is available to an employee whose "eligibility for access to classified information" is being terminated; indeed, section 17.47(a) expressly references section 3.1 of Exec. Order No. 12,968, which deals with "eligibility for access to classified information." Furthermore, section 17.47(a) expressly contemplates a right of ARC review for "applicants," yet it is hard to imagine the agency giving an applicant for employment access to classified information; contrary to the agency's suggested reading of part 17, this provision would have meaning only if it were applied when an applicant sought ARC review of a denial of eligibility for access to classified information. Additionally, subsection (i) of section 17.47 unmistakably indicates that the right to ARC review is triggered when "there has

been a denial or revocation of eligibility for access to classified information." It is also noteworthy that a June 3, 2011 opinion of the Department of Justice Office of Legal Counsel entitled *Applicability of the Foreign Intelligence Surveillance Act's Notification Provision to Security Clearance Adjudications by the Department of Justice Access Review Committee* states that the ARC review process under 28 C.F.R. part 17 is triggered when a "component determines that [an] employee is not eligible for access to classified information."[3]

¶29 We conclude that where, as here, a component of the Department of Justice terminates an employee's eligibility for access to classified information, the Department's own rules provide for a right of review before the ARC. Absent an express grant of authority, a component of a department may not provide employees with lesser rights than are granted under a policy issued at the departmental level. *Black v. Department of Transportation*, 116 M.S.P.R. 87, ¶¶ 13-15 (2011). Here, EOUSA does not claim that it has authority to vary from 28 C.F.R. part 17.

¶30 Moreover, 28 C.F.R. § 17.2(a) indicates (as the law would imply anyway) that if there is a conflict between 28 C.F.R. part 17 and Exec. Order No. 12,968, the Executive Order governs. Both the title of section 5.2 of Exec. Order No. 12,968 and the language of subsections (f)(2) and (3) of that section leave no doubt that an employee has a right to departmental-level (or agency-level, as the case may be) review when his eligibility for access to classified information is withdrawn. Because we find that the appellant had a right to ARC review under a plain reading of Exec. Order No. 12,968 and 28 C.F.R. part 17, we do not credit the testimony Employee 3, who opined that the appellant had no such right. *Cf. Connolly v. Department of Homeland Security*, 99 M.S.P.R. 422, ¶ 15 (2005) (an agency's interpretation of its own regulation is ordinarily entitled to deference,

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[3] The opinion is available at: www.justice.gov/olc/2011/security-clearance-provisions.pdf.

but no deference is due when that interpretation is "plainly erroneous or inconsistent with the regulation" itself). We do not accept the agency's argument that this career-ending revocation was also exempt from the intra-department review procedures mandated by Exec. Order No. 12,968 and 28 C.F.R. part 17.

¶31 Notwithstanding the foregoing, an agency's procedural error does not warrant reversal of an employee's removal unless the employee has shown that the error was harmful under 5 U.S.C. § 7701(c)(2)(A). When an agency commits a procedural error in the course of an adverse action, the Board may not assume that the employee was harmed. *Handy v. U.S. Postal Service*, 754 F.2d 335, 337-38 (Fed. Cir. 1985); *Stephen v. Department of the Air Force*, 47 M.S.P.R. 672, 681 (1991). Rather, the appellant bears the burden of proving harm. 5 C.F.R. § 1201.56(b)(1); *Ward v. U.S. Postal Service*, 634 F.3d 1274, 1281-82 (Fed. Cir. 2011); *Helms v. Department of the Army*, 114 M.S.P.R. 447, ¶ 6 (2010). A procedural error is harmful where the record shows that the error was likely to have caused the agency to reach a conclusion different from the one it would have reached in the absence or cure of the error. 5 C.F.R. § 1201.56(c)(3); *Stephen*, 47 M.S.P.R. at 685.

¶32 While the Board lacks authority to review the merits of the revocation decision, and thus, cannot ultimately determine whether the agency's compliance with its own procedures would have resulted in a decision not to revoke the appellant's clearance, our reviewing court in *Romero* unequivocally directed that the Board review whether an agency's failure to comply with its own regulations and procedures in revoking a security clearance is harmful error. *Romero*, 527 F.3d at 1325-26, 1329-30. Where, as here, the agency failed to afford the appellant any access to its internal process, the Board does not have any record upon which to conduct the review mandated by *Romero*.

¶33 In other circumstances, when the Board must defer to a decision that is within the sole discretion of the agency, the U.S. Court of Appeals for the Federal Circuit has indicated that the Board may opt to remand the matter back to the

agency to make a redetermination on the matter. *See LaChance v. Devall*, 178 F.3d 1246, 1260 (Fed. Cir. 1999) (when the Board reverses some of the charges, it may remand the appeal to the agency for a redetermination of the penalty, if there is an indication that the agency would have imposed a lesser penalty for the misconduct sustained by the Board). Although *Devall* concerned the deference that the Board must afford an agency's penalty determination, we find that it is applicable in this situation because it establishes a mechanism for the Board to resolve an appeal without intruding into a matter within the agency's sole discretion. Accordingly, we find that it is necessary to remand the appellant's removal to the agency for a determination in compliance with 28 C.F.R. part 17.[4]

Medical Evidence

¶34 The appellant argues at length that the agency and the administrative judge did not properly handle or evaluate the medical evidence. He contends that the agency violated 5 C.F.R. §§ 752.404(c)(3) and .404(f). He also contends that he rebutted the agency's reasons for finding him ineligible for the position and an operational security risk by presenting testimony from his doctors. He cites several decisions as supporting his assertions that the agency violated Board precedent by using statements made to a private mental health professional as grounds to revoke his eligibility and terminate him and that the Board must independently consider the medical evidence. He asserts that the administrative judge erred in not mentioning his and his doctors' testimony and did not address Supervisor 4's alleged bias against, or ignorance of, mental health issues. PFR at 3, 7, 19-25.

¶35 The appellant has failed to show any harmful or prejudicial error. He has not explained how 5 C.F.R. § 752.404(c)(3) applies to his situation because the record does not indicate that the agency prevented him from submitting medical

[4] We have considered the appellant's "3rd Supplemental Filing" and conclude that it does not affect the analysis or outcome.

evidence before he was removed, and, as stated above, he did so. Moreover, 5 C.F.R. § 752.404(f) states only that an agency may offer an examination. In any event, as the administrative judge essentially found, the Board lacks the authority to review whether the agency properly considered the medical evidence because it lacks the authority under *Egan* to review the reasons underlying the ineligibility determination. ID at 16. The decisions the appellant cites do not involve the limited scope of Board review under *Egan*.

Whistleblowing/Retaliation

¶36 The appellant asserts that the administrative judge erred in declining to accept the evidence he submitted at approximately 10 p.m. on September 30, 2009, on the basis that it was untimely, while accepting agency documents submitted after 5 p.m. on that date, and in finding that he did not prove his affirmative defense of whistleblowing. He apparently contends that the administrative judge erred in precluding him from presenting rebuttal evidence and evidence of motive to retaliate and in limiting the second hearing to Employee 1's testimony. PFR at 5, 7-8, 33-44.

¶37 In an August 31, 2009 Notice, the administrative judge informed the appellant that, one week before an October 1, 2009 prehearing conference, the appellant must provide a list of each whistleblowing disclosure as well as the date and to whom the disclosure was made, and that any additional exhibits and a list of witnesses with their expected testimony must be received one day in advance of the conference. IAF, Tab 79. On September 30, 2009, the appellant submitted a motion for leave to file his list of disclosures late, stating only that he believed that he had previously provided the information. *Id.*, Tab 82. The exhibits, which the appellant submitted at approximately 10:00 p.m. on that date, consisted of seven volumes of documents. *Id.*, Tab 85.[5] The agency objected to the

[5] The appellant later attempted to submit additional exhibits, which the administrative judge rejected. IAF, Tabs 92-93; ID at 11 n.6.

motion, *id.*, Tab 83, and the administrative judge sustained the objection, finding that the appellant did not establish good cause for his failure to comply with the clear instructions provided in the August 31, 2009 Notice. *Id.*, Tab 86. The administrative judge also rejected the exhibits, noting the time of submission; the number of exhibits, and therefore the impossibility of reviewing them in the October 1, 2009 conference; and the agency's objection. He indicated that, given his finding that the agency proved by clear and convincing evidence that it would have removed him even absent any protected disclosures, it was unnecessary to consider them. *Id.*, Tabs 86, 92; ID at 11 n.6.

¶38 We find that the appellant has failed to show that the administrative judge abused his discretion in rejecting the appellant's lists and exhibits or committed any prejudicial error in connection with his whistleblowing allegation. An administrative judge has wide discretion to control the proceedings, including holding prehearing conferences for the simplification of issues and ruling on exhibits and witnesses. *See, e.g., Sanders v. Social Security Administration*, 114 M.S.P.R. 487, ¶ 10 (2010); 5 C.F.R. § 1201.41. The Board will not overturn the administrative judge's rulings absent a showing of an abuse of discretion. *See, e.g., Sanders*, 114 M.S.P.R. 487, ¶ 10. Here, we find that the appellant has failed to show that the administrative judge abused his discretion in rejecting seven volumes of exhibits submitted overnight before the date of the scheduled prehearing conference.

¶39 In any event, the appellant has not shown how any adjudicatory error prejudiced his substantive rights. The Board lacks jurisdiction to hear the appellant's whistleblowing affirmative defense, given the finding that this case is analogous to a security clearance determination and that the limited scope of Board review set forth in *Egan* applies. *See, e.g., Hesse*, 217 F.3d at 1380; *Roach v. Department of the Army*, 82 M.S.P.R. 464, ¶¶ 48-54 (1999) (the Board found that the authority to review the merits of security clearance determinations under *Egan* must be specifically granted by statute and that Congress has not

specifically authorized the review such determinations as personnel actions under the Whistleblower Protection Act). Therefore, the appellant has provided no basis for reversing the initial decision on the ground that the administrative judge erred in declining to accept his exhibits. *See Panter v. Department of the Air Force*, 22 M.S.P.R. 281, 282 (1984).[6]

Disability Discrimination

¶40 The appellant apparently asserts that the agency regarded him as disabled as evidenced by its previously granting him a limited accommodation and that it erred in not offering him reassignment as an accommodation. PFR at 47-48. The Board generally cannot decide a claim of discrimination in an appeal from an action that was based on suspension or revocation of access to classified material because deciding the discrimination allegation would involve an inquiry into the validity of the agency's reasons for deciding to revoke the appellant's access to classified information. *Helms*, 114 M.S.P.R. 447, ¶ 9; *Hesse v. Department of State*, 82 M.S.P.R. 489, ¶ 9 (1999), *aff'd*, 217 F.3d 1372 (Fed. Cir. 2000). The Board may not engage in such an inquiry under *Egan*, 484 U.S. at 530-31. Thus, in this appeal, the Board lacks jurisdiction over the appellant's disability discrimination claim and cannot address it on the merits. *See Helms*, 114 M.S.P.R. 447, ¶ 9 and cases cited therein.

Penalty

¶41 The appellant asserts that the administrative judge erred in refusing to order disclosure of documentation supporting the prior discipline taken against him and in not mitigating the penalty. PFR at 44, 49. Mitigation, however, is not appropriate in this type of case. *See, e.g., Robinson v. Department of Homeland*

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[6] We have considered the appellant's July 28, 2012 filing, in which he cites the recent precedent of *Whitmore v. Department of Labor*, 680 F.3d 1353 (Fed. Cir. 2012). We find that *Whitmore* does not alter our analysis of the appellant's whistleblower retaliation claim.

Security, 498 F.3d 1361, 1365 (Fed. Cir. 2007) (in an adverse employment action, such as removal, based on failure to maintain the security clearance required by the job description, the absence of a properly authorized security clearance is fatal to the job entitlement). Therefore, any error in this regard did not prejudice the appellant's substantive rights and provides no basis for reversing the initial decision. *See Panter*, 22 M.S.P.R. at 282.

ORDER

¶42 Accordingly, we VACATE the initial decision and REMAND the appellant's removal to the agency to apply its internal procedures for reviewing a decision to withdraw an employee's eligibility for access to classified information under 28 C.F.R. part 17. The agency is ORDERED to initiate this review within 30 days of the Board's order and to complete it within a reasonable period of time. The appellant is ORDERED to cooperate with this review.

¶43 We further ORDER the agency to tell the appellant promptly in writing when it believes that it has fully complied with the Board's order and to describe the actions it took to carry out the Board's Order. The appellant, if not notified, should ask the agency about its progress. *See* 5 C.F.R. § 1201.181.

¶44 No later than 30 days after the agency tells the appellant that it has fully carried out the Board's Order, the appellant may file a new petition for appeal before the Chicago Regional Office. The appellant may renew all of issues raised in this appeal, and the administrative judge shall issue a new initial decision. However, except for the remanded issue of harmful procedural error, the

administrative judge may incorporate by reference his findings in the October 27, 2009 initial decision and the findings in this Opinion and Order.

FOR THE BOARD:

_____
William D. Spencer
Clerk of the Board
Washington, D.C.